TAN CHONG & SONS MOTOR CO. SDN. BHD.

v.

ALAN McKNIGHT

FEDERAL COURT, IPOH
WAN SULEIMAN FJ
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 15 OF 1982]
4 DECEMBER 1982

CONTRACT: *Sale of car - Representations by salesman prior to agreement, whether could be relied upon - Warrant - Meaning of Damages - Amendment of statement of claim.*

EVIDENCE: *When oral evidence is admissible.*

This is an appeal from the decision of Gunn Chit Tuan, J Civil Suit No. 58 of 1979, High Court Penang [1982] CLJ (Rep) 389.

The respondent, a squadron leader in the Royal Australian Air Force (RAAF) based at Butterworth, purchased from the appellants on 3 May 1978 a duty free car, white Datsun 260C Station Wagon for local use at RM17,719.54. Prior to the purchase the respondent had informed the appellants' salesman that the car must conform to the Australian Design Regulations (ADRs) as he intended to take it back to Australia and use it there. To ensure further that the car would be registered in Australia the respondent insisted upon a compliance plate or a letter from the manufacturers guaranteeing or indicating that the vehicle complied with the ADRs. The salesman made representations to the effect and it was on that basis the respondent purchased the car.

On delivery the car did not comply with the ADRs as promised earlier. The appellants became unco-operative, unhelpful and attempts to obtain a guarantee letter also proved unsuccessful. Meanwhile the respondent was reposted to Australia and as he could not take the car back with him because of non-compliance he had to sell it for RM6,500 at a loss of RM11,219.54. As a result the respondent incurred financial loss and lost a fiscal advantage of having to import a car into Australia duty-free.

The respondent sued the appellants for breach of warranty claiming damages. The learned trial Judge awarded general damages of RM10,500. The appellants appealed contending that they were not liable or that the damages awarded were too high. The respondent cross-appealed that the damages were too low.

Held:

[1] It was the representations by the salesman, expressed by words and conduct that led to the respondent to enter into the agreement to purchase the car. It would lead to a great mischief in law and would not be in the interest of business efficiency if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with.

[2] Where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. Therefore the oral representations made by the salesman were admissible.

[3] The precontract representations were an express warranty, the breach of which the appellants were liable.

[4] The amount of damages awarded should be financial loss directly suffered by him as a result of dealing with the appellants. Special damages to be allowed subject to the amendment of the statement of claim.

[5] Costs to be fixed at High Court scales.

[Appeal dismissed with costs. Cross appeal allowed with costs.]

Cases referred to:
Erskine v. Adeane [1978] 8 Ch 754
De Lessalle v. Guildford [1901] 2 KB 215
Dick Bentley Productions, Ltd. & Anor. v. Harold Smith (Motors) Ltd. [1965] 2 All ER 65
Chess (Oscar) Ltd. v. Williams [1957] 1 All ER 325
Heilbert, Symens & Co. v. Buckleton [1913] AC 30
Mendelesshom v. Normand Ltd. [1969] 2 All ER 1215
Wong Wai Cheng v. AG, Singapore [1969] 1 MLJ 59
Damu Jadhao v. Paras Nath Singh [1965] 2 MLJ 38
J. Evans & Son (Portsmouth) Ltd. v. Andrea Mersario Ltd. [1976] 2 All ER 930
Firestone Tyre Rubber Co. Ltd. v. Voking Ltd. [1951] 1 Lloyd Rep 32
Hadley v. Baxendale [1854] 9 Exch 341

Legislation referred to:
Civil Law Act 1956, s. 5(2)
Contracts Act 1950, s. 74(1)
Evidence Act 1950, s. 92, 92(b), 92(c)
Sale of Goods Act 1979 [UK], ss. 14(3), 53
Sale of Goods Act 1893 [UK], ss. 53,14(1)

Other sources referred to:
Anson's, 24th Edn., pp. 125-129
Benjamin's Sale of Goods [1974], para. 810-824

For the appellants - K. Anantham; M/s. Skrine & Co.
For the respondent - N.T. Vello (Navaratnam with him); M/s. Chang & Vello

JUDGMENT

Salleh Abas FJ:

This is an appeal from the decision of Gunn Chit Tuan, J The facts are as follows:

The Facts:

The respondent, one Alan McKnight, was a squadron leader in the Royal Australian Air Force (RAAF). In January 1978 he was just posted to the RAAF base at Butterworth and expected to be there for the next three years. Under an agreement between his Government and the Malaysian Government, the respondent as a serviceman was entitled to purchase in Malaysia a duty-free car for local use provided that the car would be taken out of Malaysia at the end of his tour of duty, and if the same car was imported to Australia he was also entitled to an Australian import duty exemption. As he enjoyed tax exemptions from both countries, i.e., Malaysia and Australia, he decided to buy a car which he could take back to and use in Australia. But he must buy a car which conformed to the Australian Design Regulations (ADRs); otherwise it could not be registered in Australia, in particular in New South Wales and Victoria, where he expected to be reposted.

Having made up his mind to buy such a car he contacted the appellants' salesman named Mr. Thomas, and after finding the services of this salesman rather unsatisfactory, he was attended to by another salesman, named Mr. Bobby Sze. After two meetings with Mr. Sze

on 5 and 6 January 1978, the respondent signed a Buyer's Order Exhibit D1, (in the judgment referred to as the Order) on 9 January 1978, whereby he committed himself to buy a white Datsun 260C Station Wagon at an agreed price of RM17,7129.54. Six conditions were printed on the reverse side of the Order, one of which, being relevant to this case, is condition No. 5, which is as follows:

> No guarantee or warranty of any kind whatsoever is given by the Company in respect of the vehicle, the subject of the order, unless such guarantee and/or warranty is separately stipulated in writing hereto, but the Buyer/Hirer shall be entitled to the benefit of the Manufacturer's warranty.

However, prior to the signing of the Order, during the first meeting on 5 January 1978 the respondent informed Mr. Sze that he wanted to buy a car that must conform to the ADRs as he wished to take it back to Australia. Mr. Sze replied that he could sell such a car but that he would have to import it first from its manufacturers in Japan. In the second meeting on 6 January 1978 Mr. Sze informed the respondent that he had cabled Japan for delivery of the car at Singapore and in the third meeting on 9 January 1978 Mr. Sze pulled out a document - which he purported to be a cable - from his brief case and read it out to the respondent to the effect that Nissan, the manufacturers, was taking out a car from its Australian assembly line and shipping it to Singapore. This document was never shown to the respondent, nor did he insist upon seeing it. To ensure that the car would be registered in Australia, the respondent insisted upon a plate called a compliance plate or a letter from the manufacturers guaranteeing or indicating that the vehicle complied with the ADRs. Mr. Sze said that the car he was ordering for the respondent would have no compliance plate but he would give the respondent such guarantee letter from the manufacturers when the car would be delivered to him. It was on the basis of these conversations with Mr. Sze and persuaded by his conduct that the respondent signed the Order.

Finally, a white Datsun 260C Station Wagon was delivered to the respondent on 3 May 1978 and the price paid. But the car did not comply with ADRs as earlier promised. This is clearly proved by the manufacturers' letter dated 12 June 1978 written in response to an inquiry by the respondent dated 5 June 1978 after he had discovered that the appellants had become unco-operative and unhelpful. Attempts at obtaining a guarantee letter also proved unsuccessful. In the meantime the respondent was reposted to Australia and as he could not take the car back with him because of noncompliance with the ADRs, he caused it to be sold through his friend. It was sold for RM6,500 thereby incurring a loss of RM11,219.54, (RM17,719.54 - RM6,500).

As a result of this dealing with the appellants, the respondent did not only incur a financial loss, but also lost a fiscal advantage of having to import a car into Australia duty-free. He thus sued the appellants claiming damages for breach of warranty; the warranty being that the appellants would deliver to him a white Datsun 260C Station Wagon which complied with the ADRs, but in breach of such promise the appellants delivered to him only an ordinary white Datsun 260C Station Wagon which not only did not comply with the ADRs, but also could not be modified to comply with these regulations.

The appellants denied that they ever made any such representation or assurance. They also denied liability because para. 5 of the conditions printed at the back of the Order (Exh. D1) which the respondent signed exempted them from any oral guarantee or warranty.

At the trial several witnesses were called by both sides. The learned trial Judge accepted the evidence of the respondent and found that there was such a warranty made and breached by the appellants and awarded general damages of RM10,500, with interest at 8% per annum

from the date of the writ to the date of payment, and costs of the suit at the Subordinate Court's scale. No special damages were awarded.

The appellants appealed to us contending that they are not liable or that he damages awarded were too high, whilst the respondent cross-appealed on the ground that the damages were too low and that he was entitled to the interest from the date of the accrual of the cause of action and to the costs of the suit at the High Court scale and also to special damages.

Issues of Liability - Warranty:

At the outset of this appeal Counsel for the appellants conceded that he accepted the findings of facts by the learned trial Judge. The appeal was therefore confined to legal issues on liability and quantum only.

As to the issue of liability the first question to ask in this case is this: was there a warranty and, if so, was it breached?

The word "warranty" in the law of Contract tends to be confusing as it may relate to a term of a contract, or to a separate enforceable promise which is collateral to a contract. (See *Anson's* 24th Edn., pp. 125-129). Insofar as the word is used to denote a term of a contract, its employment is purely for the purpose of distinguishing the most important terms (known as conditions) from the less important ones (known as warranty), the breaches of which lead to different results and give different remedies to the innocent party. If the term breached is a condition, the innocent party has the right to repudiate the contract and consider himself discharged therefrom and claim damages for the breach. If on the other hand the term broken is only a warranty the innocent party cannot repudiate the contract and his remedy is confined to the claim for damages only. In the case of a breach of a condition it is of course open to the innocent party to treat the matter as breach of warranty and sue for the damages only without having to repudiate the contract.

The other context in which the word warranty is used in the law of Contract is a separate precontract statement on the basis of which parties subsequently entered into a contract. Such precontract statements are binding and enforceable as a **collateral warranty**. It is referred to as collateral because it is external and subsidiary to the main contract. *Erskine v. Adeane* [1978] 8 Ch 754, *De Lessalle v. Guildford* [1901] 2 KB 215.

It is in the context of a collateral warranty that the respondent found his cause of action in this case, although he referred to it in para. 5 of his statement of claim as an "express" warranty. We attach no legal significance to the word "express" here other than indicating or referring to the manner in which the warranty was communicated or expressed to the respondent. It was expressed by words of mouth and by conduct of Mr. Sze.

For the purpose of determining whether these words and conduct amount to a warranty enforceable at the suit of the respondent, we can do no better than be guided by the test laid down by Lord Denning MR in *Dick Bentley Productions, Ltd. & Anor. v. Harold Smith (Motors), Ltd.* [1965] 2 All ER 65 at 67 - a test which he had followed and applied in subsequent cases. The test is this-

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the

> representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it". [1965] 2 All ER at p. 67.

One of the ways to rebut this *prima facie* inference is for the maker of the representation to show that he honestly believed on reasonable grounds that it was true. *Chess (Oscar) Ltd. v. Williams*, [1957] 1 All ER 325 and *Heilbert, Symens & Co. v. Buckleton* [1913] AC 30.

Reverting to the present appeal, there can be no doubt that it was the representations by Mr. Sze expressed by words and conduct that led to the respondent to enter into the agreement to purchase the car. Unless the appellants could show that they were innocent of making them, the representations shall be binding. In our view, there is an abundance of evidence showing that the representations were not innocent and on the contrary could even be considered to be deceitful or plain lies. It is recalled that Mr. Sze said that he would have to import the car from Japan and he had cabled Japan for delivery of it in Singapore, and a few days later he read out to the respondent what purported to be a telegram from Nissan in Japan to the effect that it had taken out a car from its Australian assembly line and shipped it to Singapore. These statements were not only untrue but also obviously lying and calculated to mislead the respondent into placing an order for a car. If Nissan had actually taken out a car from its Australian assembly line, the car delivered to the respondent would have been complying with the ADRs. Further, if Mr. Sze had actually cabled Japan and had received a cable in reply, there was no necessity at all for Mr. Quah Keat Ban, the sales manager of the appellants, under whom Mr. Sze worked, to write a letter on 9 January 1978, - i.e., the same date as the date of the Order - to the appellants' office in Singapore informing the latter that a new Datsun 260C Station Wagon was sold to the respondent and requesting that office to reserve a car for collection in a few day's time. The truth is that no such cables were ever sent to or received from Japan. In the circumstances of the case, we cannot see how the appellants could rebut the *prima facie* inference of the binding nature of these representations. There is no inkling of an honest belief at all in the truth of these representations.

Counsel for the appellants submitted to us that the respondent was not relying upon the representations made by Mr. Sze when signing the Order (Exhibit D1) and that even if he did so rely, Mr. Sze had no authority to bind the appellants by such representations. With respect, we remain unpersuaded.

As to the effect of the representations on the respondent, there is clear evidence that had it not been for the promise Mr. Sze to deliver him a white Datsun 260C Station Wagon complying with the ADRs, he would not have signed the Order. In this evidence, which the learned trial Judge accepted, the respondent said:

> After satisfying myself I entered into a contract. I pointed out to Mr. Sze that contract did not refer to ADRs and he said it was not necessary to include it as the price of the car was specially for a car imported for sale and eventual import into Australia.
>
> (p. 123, F-G, of Appeal Record)

We therefore respectfully reject the submission.

We also cannot accept the submission by Counsel for the appellants that the representations by Mr. Sze were not binding on the appellants, because he was only a salesman. To bind the appellants, Counsel argued, the representations must be made by a person of a higher authority than a salesman. As between him and the appellants, Mr. Sze might not have the authority to make the representations, but as regards the relationship

between the appellants and the respondent, Mr. Sze, as a salesman, employed by the appellants, certainly had an ostensible authority to make these representations. Selling cars was the job of Mr. Sze and these representations were made by him in the course of selling a car to the respondent. It would lead to a great mischief in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with. If an attendant employed by a garage owner in *Mendelesshom v. Normand Ltd.* [1969] 2 All ER 1215 at 1218 could be held to have an ostensible authority to make a representation to a client of the garage to the effect that he would lock the client's car, likewise a car salesman must be held to have same authority; otherwise no one would deal with a salesman and everybody would insist on dealing with the manager. In any case Mr. Sze was not an ordinary salesman. He appeared to have enjoyed the trust and confidence of the appellants and must be a reliable one, because after the respondent had complained of the inefficient and unsatisfactory service of the previous salesman, Mr. Thomas, Mr. Sze was the one who was sent to deal with the respondent. Furthermore, we observe that at the time of the trial in September 1981 Mr. Sze had already become the appellants' Branch Manager at Ipoh. These facts clearly show that Mr. Sze was at the material time a very much trusted employee of the appellants. Thus the submission fails.

Admissibility of Pre-contract statement and s. 92 of Evidence Act:

There is this rule of evidence contained in s. 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section. Counsel for the appellants therefore submitted that the representations having been orally made, whilst the agreement, namely the Order, being in writing, the representations were therefore not admissible. The case of *Wong Wai Cheng v. A.G. Singapore* [1969] 1 MLJ 59 was referred to in the Court below as an authority for the submission. That case, however, dealt with an attempt by a party to the contract to prove an implied term which would affect the terms of the written contract by relying upon pre-contract negotiations and statements. But the primary purpose - rather the dominant purpose - of proving the pre-contract statements in the case under the present appeal was not to contradict, vary, add or subtract terms of the Order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract subsequently entered into. Such proof is obviously authorised by the provisions (b) and (c) and also illustrations (d), (g) and (h) of s. 92. Perhaps, a short answer to the objection can be given in that the prohibition against admissibility of evidence under s. 92 only applies where all - as opposed to some only - of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression "When the terms of any such contract" at the beginning of s. 92 must be read to mean "When **all** the terms of any such contract". *Damu Jadhao v. Paras Nath Singh* [1965] 2 MLJ 83 at 39.

We therefore hold that the oral representations made by Mr. Sze were admissible.

Printed Condition No. 5:

Having decided that the representations were a warranty binding, upon the appellants on whose behalf Mr. Sze made them, the next question is to determine whether the appellants could rely upon their printed condition No. 5 to exclude the effect of the representations.

For our guide it is necessary to examine the principles applied by the Court of Appeal in England in *J. Evans & Son (Portsmouth) Ltd. v. Andrea Mersario Ltd* [1976] 2 All ER 930. In this case, an English importer of machinery from Italy had been using the services of a forwarding agent at Rotterdam to place the goods in crates or trailers and ship them below deck. Later, when the agent wished to ship the goods by means of containers, the agent gave an oral assurance to the importer that the machines would be carried in containers and placed under deck. On the faith of the assurance the importer agreed to enter into a contract of carriage which contained the usual printed standard conditions of the forwarding trade exempting the agent from liability. As a result of swells occurring during the voyage, the goods were lost. On a suit and the subsequent appeal by the importer, the Court of Appeal held that notwithstanding the printed conditions, the oral assurance given by the agent was binding. Denning MR regarded the oral assurance as a distinct collateral agreement or warranty, whilst Roskill LJ, besides agreeing with Lord Denning, thought that the oral representations formed an integral part of the agreement for the carriage of goods. Geoffrey Lane, LJ on the other hand considered the oral representation to be a new term of the contract altogether - a term superimposed upon the previous contracts on the basis of which goods had been carried previously. In any event, whether one regards the oral representation as a separate agreement or as an integral part of it or even as a new term, there is no running away from the fact that the oral representation was contradictory to the printed conditions. This conflict did not in any way deter the Court from doing justice. By relying on the authority of Devlin J (as he then was) in *Firestone Tyre Rubber Co. Ltd. v. Voking Ltd.* [1951] 1 Lloyd Rep 32 at 39, the Court held that as the importer entered into the contract on the basis of the oral representation, the printed conditions exempting the agent from liability were repugnant to such representation and should therefore be rejected, as otherwise the latter would become completely illusory. Thus by treating the oral representation as having an overriding effect the importer was held to be entitled to damages. It is the need to attach responsibility upon the maker of pre-Contract statements that such statement have been given an overriding effect by the Court despite their defiance of the terms of a written contract - See *Anson* p. 128.

Reverting to the present appeal, whether we regard the representations by Mr. Sze as a warranty, i.e., as an enforceable contractual promise, or as an integral part of the sale contract it is clear that these representations are in conflict with condition No. 5 printed on the reverse side of the Order signed by the respondent. However, on the authority of *J. Evans & Son's* case (*supra*) and other authorities cited by Lord Denning in that case, we hold that the representations must be given an overriding effect and the printed condition must therefore be rejected.

Application of English law:

In the Court below there were some arguments about the application of English Sale of Goods Act, 1979. Counsel for the appellants contended that although English law relating to the sale of goods applied to this case because of s. 5(2) of our Civil Law Act, 1956, the applicable law was the Sale of Goods Act 1893 and not the 1979 Act. Counsel for the respondent on the other hand submitted that the law applicable was the 1979 Act and therefore invoked s. 14(3) of the Act in order to show that in this case there was an implied condition as to the fitness of the car for the purpose of importation into and use in Australia, because the respondent had informed the appellants of its intended use and for the purpose had relied upon the judgment and skill of the appellants. It must be noted that the 1893 Act was completely replaced by the 1979 Act and that the provision of s. 14(3) of the 1979 Act is not new; it being a re-enactment of s. 14(1) of the 1893 Act though not in identical terms.

Thus, whatever English Act is applicable it is clear that in English law before and after 1979 a buyer is entitled to rely upon an implied condition as to fitness of the goods for use of which he bought them provided of course he communicated to the seller of the intended use of goods and relied upon their judgment and skill. See *Benjamin's Sale of Goods* [1974], para. 810-824.

However, in the context of the present appeal as we have already held that the pre-contract representations were a warranty, the breach of which the appellants are liable, the question concerning an implied conditions as to fitness of purpose would be irrelevant and at the most would only represent the respondent's alternative ground to claim liability against the appellants. Since the respondent contended, and we accept, that the pre-contract statements made by Mr. Sze were an express warranty, we cannot see how the same statements could be held to be an implied term and condition. Such contention would amount to saying that the express becomes an implied. This is obviously absurd and illogical. We, therefore, do not think it necessary or relevant to decide the question as to which of the two English Sale of Goods Act, whether the 1893 Act or the 1979 Act by virtue of s. 5(2) of our Civil Law Act 1956 is applicable.

Damages:

The measure of damages in respect of the breach of warranty is prescribed in s. 53 of the 1979 Act, which is a re-enactment of s. 53 of the 1893 Act. Thus whether the 1979 or the 1893 Act is considered to be the governing Act, it makes no difference - the provisions being the same under both Acts. The relevant provisions are sub-sections(2) and (3), which are as follows:

> (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty;
>
> (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

Because there is no car complying with the ADRs available in Malaysian market, it is clear that the yardstick laid down in sub-section (3) above cannot be applied. Moreover, the warranty in the present case is not a mere warranty of quality covered by this subsection, but a warranty as to the nature or essence of the car itself. Thus the only rule applicable for the purpose of determining damages in this case must be the rule laid down in subsection (2); which itself is the first limb of the principle laid down in the celebrated case of *Hadley v. Baxendale* [1854] 9 Exch 341 at 354, which was incorporated in s. 74(1) of our Contracts Act, 1950, i.e., the estimated loss directly and naturally resulting in the ordinary course of events from the breach.

There can be no doubt that the respondent incurred a financial loss of RM11,219.54, being the difference between the price he paid for the car which did not answer to the warranty and the price he obtained when he sold it subsequently, (RM17,719.54 - RM6,500). In addition to this loss, he also lost a fiscal advantage of bringing the car into Australia without customs duty. Although this loss was pleaded in para. 9 of the respondent's statement of claim, not an iota of evidence was led by the respondent. Whilst evidence as to the price of a similar car complying with the ADRs was given as at A$10,578.88, no evidence was, however, given as to the amount or rate of Australian import duty on such car or other cars, nor was the Court informed as to whether the price given above was inclusive or exclusive of the import duty. In our view the fiscal advantage which the respondent lost and for which he should

be compensated should be the amount of import duty which he would have saved because of the exemption enjoyed by him under the Australian law. The other advantage which he lost was probably his eligibility of having the car transported to Australia at the expense of his Government. Since no evidence was led on these two matters, it is impracticable for us to go further and measure his fiscal loss as in the absence of any evidence it would be highly speculative to do so. We therefore hold that the amount of damages which should be awarded should be the financial loss directly suffered by him as a result of the dealing with the appellants, i.e., RM11,219.54. The award made by the learned trial Judge should be altered accordingly.

Special damages and amendment of pleadings:

The respondent cross-appealed on the omission of the learned trial Judge to award special damages for deprivation of the use of a car resulting in his incurring travelling expenses for himself and members of his family during the period of 3 months after his return to Australia until he purchased a new car. As these damages were not pleaded and the respondent's application to amend the statement of claim to include them having been overruled, the learned trial Judge therefore did not make the award complained of. There is, however, the uncontroverted evidence given by the respondent on this point, which is as follows:

> I was without a car for three months and had to travel by public transport which cost A$10 per day ... I claim damage for breach of warranty and also special damage for loss of use of a car, interest and costs.
>
> (p. 126 of Appeal Record)

Thus for three months at A$10 per day, the travelling expenses were computed to be A$900 i.e., 90 day (being three months) times A$10 and at the rate of exchange of RM2.6015 for A$1, the amount of claim under this heading is RM2,341.35.

This claim could not of course succeed unless the statement of claim is amended. His appeal on this point is therefore essentially an appeal against the refusal of the learned trial Judge to allow his application to amend the statement of claim which he had made in the course of submissions in the Court below. The special damages claimed by the respondent in this case were not of the nature that involved complicated computations but one which any person must as part of his living expenses in the present day world have incurred. Moreover, as evidence was already given by the respondent without any objection or a murmur by the appellants, there cannot really be any objection against the pleading being amended. We, therefore, feel that it is just and proper that the learned trial judge should allow the amendment of the pleading and make the necessary award on the basis of the evidence given.

Interest:

The next point raised in the respondent's cross-appeal is interest. He submitted that the 8% interest awarded by the learned trial Judge should run from the date of the breach of the warranty, i.e., 3 May 1978, the date when the car was delivered to the respondent and not from the date of the writ. As interest is a matter of discretion, we cannot see how on the facts of this case the learned Judge was in error to order interest to run from the date of the writ.

Costs:

As to the costs, we agree with Counsel for the respondent that these should be fixed at High Court scales, because we ourselves find that this is not an easy case to deal with. It involves difficult points of law, especially on the question of warranty and measure of damages.

Conclusion:

Finally for the reasons given in the preceding paragraphs, we dismiss the appellants' appeal with costs and allow the respondent's cross-appeal also with costs. Our order should be that the respondent is entitled to:

(a) general damages of RM11,219.54;

(b) special damage of RM2,341.35;

(c) interest at 8% per annum from the date of the writ;

(d) costs at High Court scale in the Court below;

(e) costs of this appeal and cross-appeal; and

(f) the deposit should be given to the respondent on account of taxed costs.

Also found at [1983] 1 CLJ 77